Supreme Court, U.S.
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No. 04-

In the

Supreme Court of the United States

SSA GULF, INC.,

PETITIONER,

v.

ROOSEVELT MAGEE,

RESPONDENT.

On Petition For a Writ Of Certiorari To
The U.S. Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD P. SALLOUM
FRANKE, RAINEY & SALLOUM
Post Office Drawer 460
Gulfport, MS 39502
(228) 868-7070

JONATHAN S. MASSEY
Counsel of Record
JONATHAN S. MASSEY, P.C.
3920 Northampton St. N.W.
Washington, D.C. 20015
(202) 686-0457

IRA J. ROSENZWEIG
ADAMS, HOEFER, HOLWADEL
& ELDRIDGE, LLC
Pan American Life Center
601 Poydras St., Suite 2490
New Orleans, LA 70130
(504) 581-2606

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, wholly displaces and preempts state tort damages claims by longshore employees against their stevedore employers, so as to trigger federal question jurisdiction pursuant to 28 U.S.C. § 1331.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the nominal respondent in the court of appeals was the Honorable Kurt D. Engelhardt, Judge, United States District Court for the Eastern District of Louisiana.

The following parties filed responses to the petition for mandamus in the court of appeals: James J. Flanagan Shipping Corporation; Cooper/T. Smith Stevedoring Company, Inc.; Asbestos Corporation Limited.

The following parties were defendants in the district court but did not enter an appearance in the court of appeals: Eagle, Inc.; Boland Machine & Manufacturing Co.; Dixie Machine, Welding & Metal Works, Inc.; Sank, Inc. f/k/a Buck Kreihs Co.; American Sugar Refining, Inc.; BCI Acquisitions, Inc.; P&O Port Gulfport, Inc. f/k/a Atlantic & Gulf Stevedores, Inc.

RULE 29.6 STATEMENT

Petitioner SSA Gulf, Inc., formerly known as SSA Gulf Terminals, Inc. and Ryan-Walsh Stevedoring, states that its parent company is SSA Marine, Inc. No publicly held company owns more than 10% of SSA Gulf's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner SSA Gulf, Inc. ("SSA Gulf") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's order (Pet. App. 1a) denying the petition for writ of mandamus is unreported. The opinion of the district court (*id.* 2a) is also unreported.

JURISDICTION

The order of the court of appeals was entered on October 5, 2004. Pet. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 5 of the Longshore and Harbor Workers' Compensation Act ("LHWCA") provides in relevant part:

> The liability of an employer prescribed in section 4 [33 U.S.C. § 904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death.

33 U.S.C. § 905(a).

STATEMENT OF THE CASE

1. Statutory background.

The Longshore and Harbor Workers' Compensation Act ("LHWCA"), 44 Stat. 1424, as amended, 33 U.S.C. § 901 *et seq.*," is a comprehensive scheme to provide compensation 'in respect of disability or death of an employee . . . if the disability or death results from an injury occurring upon the navigable waters of the United States,'" including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 294 (1995) (quoting 33 U.S.C. § 903(a)). The Act focuses primarily on such occupations as longshore and harbor workers, ship repair personnel, shipbuilders, and shipbreakers. Under the LHWCA, nonseaman maritime workers, as defined in § 902(3), are afforded no-fault workers' compensation claims against their employers, *see* § 904(b) and negligence claims against vessels, *see* § 905(b), for injury and death.

The LHWCA creates a comprehensive scheme for claims by eligible workers. The program is administered by the Secretary of Labor through the Director of Office of Workers' Compensation Programs. 33 U.S.C. § 939. The Act prescribes detailed procedures for the filing and processing of claims. §§ 913-14, 919-20. Any claim for benefits must proceed exclusively before an administrative law judge ("ALJ"), and any challenge to the ALJ's ruling must first be reviewed by the Benefits Review Board ("Board"). §§ 919(a), 921(b). Any appeal from the Board's decision must be filed in a United States Court of Appeals. § 921(c).

The LHWCA provides formulae for the computation of benefits for disability or death based on the employee's weekly wages. §§ 908-09, 910. The Act contains rules for the payment of compensation where third parties may be liable, § 933; for the

modification of awards, § 922; and for the regulation of attorneys' fees. § 928.

Under the authority of the LHWCA, the Secretary of Labor has promulgated a detailed set of regulations implementing all portions of the Act. *See* 20 C.F.R. §§ 701-704. The regulations provide rules for claims relating to occupational diseases. § 702.602-604. This Court has recognized that a shipfitter suffering from employment-related asbestos disease is entitled to administrative compensation from his employer under the LHWCA. *See Ingalls Shipbuilding v. Director, Office of Workers' Compensation Programs, DOL*, 519 U.S. 248, 251 (1997).

The regulations also address the procedures for the payment of uncontested claims, 20 C.F.R. § 702.231; the entry of settlement agreements, §§ 702.242-243; and the processing of controverted claims, §§ 702.251-274, 301-349. The rules governing the conduct of formal hearings include provisions regarding depositions, interrogatories, evidence, witnesses, oral arguments, and written submissions. The regulations also provide for the modification of compensation awards and payment of supplemental compensation. § 702.372-373.

The comprehensive statutory framework does not permit a longshore worker to sue a stevedore employer for tort damages in state court. Indeed, central to the LHWCA is the exclusivity provision of Section 5, which provides that the liability of an employer under the LHWCA "shall be exclusive and in place of all other liability" to the employee, "his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death." § 905(a).

2. Proceedings in this case.

Respondent filed the instant lawsuit in Louisiana state court, Orleans Parish. The Petition for Damages alleged that, while

Roosevelt Magee was employed as a longshoreman with SSA Gulf and other stevedoring companies, he loaded and unloaded asbestos cargo at the Port of New Orleans. According to the lawsuit, exposure between 1965 and 1997 contributed to certain asbestos-related diseases, including lung cancer. The lawsuit seeks special, general, and exemplary damages.

SSA Gulf timely removed this case under 28 U.S.C. § 1441(b), on the grounds that the LHWCA wholly displaces and preempts state-law tort claims against stevedore employers so as to come within federal question jurisdiction pursuant to 28 U.S.C. § 1331. The removal was joined by all defendants who had been served at the time of removal. By separate pleadings, petitioner and other stevedore defendants filed a Rule 12(b)(6) motion to dismiss on the ground that the LHWCA, as respondent's sole and exclusive remedy, completely preempts any state-law claims against stevedore employers.

Plaintiff moved to remand, arguing that the LHWCA "cannot be fairly understood as preempting state remedies." "The availability of a federal remedy does not necessarily foreclose an injured worker's claim for relief under state law." According to the plaintiff, the LHWCA "contains no express declaration of Congressional intent to prohibit states from providing compensation to injured workers in lieu of, or in addition to the benefits provided under the LHWCA." Plaintiff concluded by contending that, "[w]ith concurrent jurisdiction, an injured worker has the option of pursuing a claim for remedies under either state law or federal law. In this case, plaintiff chose to pursue a state remedy for his injuries, which include actions in tort."

The district court entered an order of remand without deciding whether the LHWCA completely preempts state-law claims against stevedore employers and without reaching petitioner's Rule 12(b)(6) motion to dismiss based upon the exclusive remedy provisions of the LHWCA. Pet. App. 2a.

Instead, the district court entered a remand order adopting the reasoning of *Hernandez v. Todd Shipyards*, 2004 WL 1543184 (E.D. La. 2004). The district court in *Hernandez* held that the LHWCA does not provide a basis for removal of purely state-law claims. "[T]he LHWCA contains no civil enforcement provision that creates a federal cause of action that could be litigated in either federal or state court." *Id.* at *4.

SSA Gulf filed a petition for writ of mandamus presenting the question whether the LHWCA creates federal question jurisdiction for removal purposes because it completely preempts state-law tort claims against stevedore employers. Respondent filed a response attaching its district court motion to remand. By order of October 5, 2004, the Fifth Circuit denied the petition. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

This case presents the question whether the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"), wholly displaces and preempts state tort damages claims by longshore employees against their stevedore employers, so as to trigger federal question jurisdiction pursuant to 28 U.S.C. § 1331. The decision below squarely conflicts with a holding of the Fourth Circuit, as well as with governing precedent from this Court regarding the "complete preemption" doctrine.

Further, the decision below threatens a substantial disruption of the LHWCA scheme by enabling state courts – including state-court judges and *juries* – to decide questions of LHWCA benefits and coverage in inconsistent and non-uniform ways. The decision below cannot be reconciled with the holdings of this Court and at least eight other circuits recognizing that Congress intended for the LHWCA to serve as the *exclusive* remedy for longshore employees against their stevedore employees.

The disruption of the statutory scheme is real rather than hypothetical. The impact is illustrated by a recent petition for certiorari presenting the same question as this case. *See* No. 04-327, *petition for cert. denied* (Nov. 15, 2004) ("*Hernandez*"). In *Hernandez,* SSA Gulf warned that "[a]bsent corrective action by this Court, it is clear that stevedore employers will face a flood of state-court tort lawsuits seeking enormous damage awards in plain violation of the statutory command of the LHWCA." Petition for Writ of Certiorari in No. 04-327, at 20.

The instant case shows that the flood of new cases is already underway. Unless the Fifth Circuit's error is corrected, plaintiffs will continue filing state-court tort suits against stevedore employers in Louisiana state court and other notorious anti-defendant venues, with the intent of circumventing the LHWCA's exclusive remedy provisions.

Accordingly, the denial of certiorari in No. 04-327 does not militate in favor of denial of certiorari here. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)). "We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard." *Daniels v. Allen*, 344 U.S. 443, 491 (1953) (Frankfurter, J.).

The cases are legion in which this Court has granted certiorari after initially denying the writ in a previous case presenting the same legal question.[1] Such a process is inevitable in a system in

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[1] *E.g.*, *United States v. Lara*, 124 S. Ct. 1628, 1632 (2004); *Illinois v.*

which this Court encourages percolation of issues in the lower courts. Here, the Fifth Circuit has demonstrated that its *Hernandez* decision was not aberrational. The Fifth Circuit has made clear that it will adhere to its erroneous legal position and will continue to allow state-court plaintiffs to frustrate the exclusivity provision of the LHWCA.

Hence, the Fifth Circuit's decision in this case confirms the palpable threat to the LHWCA's statutory scheme. Because the rule in this case conflicts with decisions of this Court and of numerous other circuits, this Court's plenary review is urgently needed. In the alternative, this Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004). Although this Court's decision in *Davila* was issued prior to the Fifth Circuit order in this case, and although SSA Gulf's petition for mandamus cited *Davila*, the Fifth Circuit's order is inconsistent with *Davila*.[2]

Lidster, 540 U.S. 419 (2004); *United States v. Knights*, 534 U.S. 112, 116 (2001); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2004); *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 9 (2000); *Farragher v. City of Boca Raton*, 524 U.S. 775, 785 (1998); *Monge v. California*, 524 U.S. 721, 729 (1998); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 163 (1998); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 759 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269 (1995); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130 n. 1 (1994).

[2] This Court has frequently GVR'ed cases even whether the lower court decision was issued after the governing Supreme Court opinion. *See, e.g.*, No. 97-8284, *Schweninger* v. *Minnesota*, 525 U.S. 802 (1998) (remanded in light of *Kansas* v. *Hendricks*, 521 U.S. 346 (1997)); No. 97-7931, *Coleman* v. *Minnesota*, 524 U.S. 924 (1998) (same); No. 97-5901, *Hodgkiss* v. *United States*, 522 U.S. 1012 (1997) (remanded in light of *Bailey* v. *United States*, 516 U.S. 137 (1995)); No. 90-1936, *Parker Solvents* v. *Royal Ins. Cos. of Am.*, 502 U.S. 801 (1991) (remanded in light of *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991), decided a few days before lower court's decision); No. 90-524, *Connecticut* v. *Geisler*, 498 U.S. 1019 (1991) (remanded in light of *New York* v. *Harris*, 495 U.S. 14 (1990), decided three weeks before lower court's opinion); No. 89-5991, *Patterson* v. *South*

A. The Decision Below Conflicts With A Holding Of The Fourth Circuit.

The rule followed below is inconsistent with the decision of the U.S. Court of Appeals for the Fourth Circuit in an indistinguishable case. Certiorari is therefore amply warranted.

In *In re CSX Transportation, Inc. v. Shives*, 151 F.3d 164 (4th Cir. 1998), the Fourth Circuit held that a federal district court erred in remanding to state court a lawsuit by a harbor worker against his employer. The Fourth Circuit held that "[t]he question of whether the LHWCA applies to a work-related injury is exclusively a federal question which Congress never intended for state courts to resolve." *Id.* at 167. "An LHWCA claim must be filed with the Department of Labor where it is assigned to an administrative law judge whose decision is reviewed by the Benefits Review Board. Review by the courts is authorized through a petition for review, which may be filed only in the [federal] courts of appeals . . . ." *Id.* at 171. State courts "do not have jurisdiction over LHWCA cases." *Id.* The Fourth Circuit explained that, "if we were to [remand this case to state court], we would be committing the federal question of LHWCA coverage to the state court when Congress intended that it be decided exclusively in federal court." *Id.* The court of appeals opined that, because the LHWCA administrative remedy is exclusive, the only proper course was dismissal of the case: "the district court should not have remanded the case to state court, but should have dismissed it." *Id.*

The decision below is utterly irreconcilable with the holding of the Fourth Circuit in *Shives*. The Fourth Circuit held that, when a state-court action against a stevedore employer is

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Carolina, 493 U.S. 1013 (1990) (remanded in light of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987)); No. 89-401, *Wecht* v. *Inmates of Allegheny County*, 493 U.S. 948 (1989) (remanded in light of *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981)).

removed to federal district court, the proper remedy is dismissal, not remand. The courts below followed the opposite rule. In the Fourth Circuit, longshore and harbor workers who attempt to file state-court actions against their employers will properly be remitted to their administrative remedies. Under the rule followed in the case at bar, longshore and harbor workers will instead be allowed to pursue their tort actions in the state courts, subject only to this Court's discretionary review via its certiorari jurisdiction. State-court judges and potentially state-court juries will decide issues of LHWCA benefits and coverage.

Circuit-to-circuit variation in the administration of the LHWCA would be intolerable. Shipping is inherently an interstate and indeed international form of commerce. Operations cannot be confined to the boundaries of a particular state or judicial circuit. If stevedore activities in New Orleans and South Carolina are subject to different rules, then commerce will be hampered, and Congress' goal of a uniform national system of compensation will be frustrated.

The decision below is not only in conflict with the holding of the Fourth Circuit; it is also in tension with the rulings of at least eight other circuits holding that Congress intended for the LHWCA to serve as the *exclusive* remedy for longshore employees against their stevedore employees. *See, e.g.*, *Stewart v. Dutra Constr. Co.*, 343 F.3d 10, 14 (1st Cir. 2003), *cert. granted*, 124 S. Ct. 1414 (2004); *Gravatt v. City of New York*, 226 F.3d 108, 111 (2d Cir. 2000), *cert. denied*, 532 U.S. 957 (2001); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 938-39 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *Artis v. Norfolk & Western Ry.*, 204 F.3d 141, 144 (4th Cir. 2000); *Stowers v. Consolidated Rail Corp.*, 985 F.2d 292, 293 (6th Cir.), *cert. denied*, 510 U.S. 813 (1993); *Johnson v. Continental Grain Co.*, 58 F.3d 1232, 1235 (8th Cir. 1995); *Sample v. Johnson*, 771 F.2d 1335, 1346-47 (9th Cir.1985), *cert. denied*, 475 U.S. 1019 (1986); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1527 (11th Cir. 1990), *cert. denied*, 498 U.S.

1026 (1991).

This Court's review is therefore amply warranted.

B. The Decision Below Conflicts With Governing Precedent of this Court Regarding the "Complete Preemption" Doctrine.

Certiorari is necessary for a further reason: The rule in this case conflicts with decisions of this Court regarding the "complete preemption" doctrine. This doctrine reflects the recognition that, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987). "Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

This Court first recognized the complete preemption doctrine in *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968). In *Avco*, an employer sought an injunction in state court to bar the defendant labor union from striking. The union removed the suit to federal court, and this Court upheld the removal, opining that Section 301 of the Labor Management Relations Act ("LMRA") so completely preempts state law that the employer's complaint should be considered as arising under Section 301. 390 U.S. at 560. The necessary ground of decision in *Avco* was that "the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violations of contracts between an employer and a labor organization. . . . Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. . . . *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Bd. of Cal. v.*

Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 23-24 (1983). *See also Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998) ("Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law") (internal quotation marks omitted).

In recent years, this Court has issued two important decisions revising and clarifying the complete preemption doctrine. In *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003), this Court held that causes of action for usury filed in state courts against national banks are removable to district court under § 1441(b) as "arising under" federal law – even when federal law is not mentioned in the complaint. Most recently, this Court invoked the complete preemption doctrine in *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488 (2004), which held that when a federal statute (in that case, ERISA) completely preempts a state-law cause of action, the state case may be removed to federal court.

In both *Beneficial Nat'l Bank* and *Davila*, this Court instructed that the principal focus of complete preemption should be on whether the federal statutory scheme comprehensively displaces the state law at issue. The rulings of the courts below cannot be reconciled with this Court's decisions, particularly its recent holdings.

1. The Courts Below Applied An Obsolete Legal Standard Regarding The Complete Preemption Doctrine.

The district court in this case adopted the reasoning in *Hernandez* that the LHWCA does not create federal question jurisdiction because it "contains no civil enforcement provision that creates a federal cause of action that could be litigated in either federal or state court" and "does not contain a specific jurisdictional grant to the federal courts for the enforcement of a right created by the LHWCA." 2004 WL 1543184, *4. The

district court's description of the LHWCA was inaccurate because the LHWCA does in fact contain provisions for federal court review and for the enforcement of federal rights. The Act provides that "[a]ny person adversely affected or aggrieved by a final order of the [Benefits Review] Board may obtain a review of that order in the United States court of appeals." § 921(c). The LHWCA also provides that district courts may enforce federal rights under the Act by issuing injunctions against employers not in compliance with compensation orders. *See* § 921(d).

Moreover, the legal standard followed by the courts below conflicts with this Court's precedent – particularly the recent decisions of *Beneficial National Bank* and *Davila*. These recent decisions have refined and clarified the complete preemption doctrine by making clear that the relevant issue is Congress' intent to completely displace state law through the enactment of a comprehensive statutory scheme. In *Beneficial National Bank*, for example, this Court made clear that the existence of a comprehensively preemptive federal statute means that any assertion of a state-law cause of action necessarily raises a federal question: "When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under 28 U.S.C. § 1441(b) . . . ." 539 U.S. at 8.

This Court reaffirmed the same principle in *Davila*: "When a federal statute wholly displaces the state-law cause of action through complete pre-emption, the state claim can be removed." 124 S. Ct. at 2495 (internal quotation marks omitted). Thus, by creating a comprehensive federal scheme providing the exclusive remedy against stevedore employers, and by eliminating all related state-created rights, the LHWCA gives rise to federal question jurisdiction under the complete preemption doctrine.

Tellingly, in both *Beneficial National Bank* and *Davila*, this

Court focused on the federal interest in preserving the uniformity of a comprehensive statutory scheme – the same federal interest that lies at the heart of the LHWCA. In *Beneficial National Bank*, this Court observed that "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from possible unfriendly State legislation." 539 U.S. at 10 (internal quotation marks omitted). "The same federal interest . . . supports the established interpretation of [the National Bank Act] that gives those provisions the requisite pre-emptive force to provide removal jurisdiction." *Id.* at 11.

In *Davila*, this Court pointed to "Congress' purpose [in ERISA] of creating a comprehensive statute for the regulation of employee benefit plans." 124 S. Ct. at 2495. "Therefore, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Id.*

Precisely the same reasoning is applicable in the context of the LHWCA, which creates a comprehensive federal scheme that (as discussed further in Part D, *infra*) would be disrupted by state-court causes of action. Congress plainly intended the LHWCA administrative remedy to be exclusive.

Although the statutes at issue in *Beneficial National Bank* and *Davila* contained federal private rights of action, nothing in this Court's reasoning indicated that the presence of a federal "civil enforcement provision that creates a federal cause of action that could be litigated in either federal or state court" (*Hernandez*, 2004 WL 1543184, *4) was a *sine qua non* of the complete preemption doctrine. This Court should grant review in this case to make clear that the existence of a civil enforcement section that confers a private cause of action is merely an indicator of Congress intent, not an independent requirement of complete preemption. Indeed, in the case of a workers' compensation

statute like the LHWCA, it makes little sense to examine the federal statute for evidence of "a federal cause of action that could be litigated in either federal or state court." *Id.* The entire thrust of an administrative compensation scheme like the LWHCA is *not* to create a judicially enforceable damages action but rather to keep claims *out of the courts.* Instead of trying to identify congressional intent, the courts below affirmatively frustrated it. The LHWCA's creation of an exclusive federal remedy in the form of a right to administrative compensation should have been enough to satisfy the complete preemption doctrine.

Nor does the complete preemption doctrine require a "specific jurisdictional grant to the federal courts," as the district court in *Hernandez* erroneously asserted. 2004 WL 1543184, *4. In fact, in *Beneficial Nat'l Bank*, this Court instructed that "the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable." 539 U.S. at 9 n.5.

To the extent that various dated Fifth Circuit decisions say otherwise, they are contrary to the recent decisions of this Court and further underscore the need for this Court's review. For example, the district court in *Hernandez* relied extensively on *Aaron v National Union Fire Ins. Co.*, 876 F.2d 1157 (5th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990), which opined that "the preemptive force necessary to create removal jurisdiction should only be held to exist when 'Congress has clearly manifested an intent to make causes of action . . . removable to federal court.'" *Id.* at 1163 (quoting *Taylor*, 481 U.S. at 68 (Brennan, J., concurring)). The concurring opinion cited by *Aaron* is plainly *not* the law after *Beneficial Nat'l Bank*, 539 U.S. at 9 n.5, if indeed it ever represented the law. Because the courts below applied an improper legal test that conflicts with governing precedent of this Court, certiorari is amply warranted.

2. This Court Should Grant Review To Continue To Clarify The Complete Preemption Doctrine.

This case presents an ideal opportunity to continue the clarification of the complete preemption doctrine – an effort already begun in *Beneficial National Bank* and *Davila*. Certain lower courts have perceptively recognized that "[t]h[e] analytical framework has been changed by" *Beneficial Nat'l Bank*. *See Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 304 (2d Cir. 2004). "Given the Supreme Court's approach in *[Beneficial Nat'l Bank]*, we conclude that it means to extend the complete preemption doctrine to any federal statute that both preempts state law and substitutes a federal remedy for that law, thereby creating an exclusive federal cause of action." *Id.* at 305. *See also* Richard H. Fallon, Jr., et al., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 22 (5th ed. Supp. 2003) (reaching the same conclusion).

However, other lower courts have expressed confusion over the complete preemption doctrine, describing it as a "doctrinal minefield." *Lippitt v. Raymond James Fin. Servs.*, 340 F.3d 1033, 1041 (9th Cir. 2003). *See also Ervast v. Flexible Prods. Co.*, 346 F.3d 1007, 1014 (11th Cir. 2003) (complete preemption doctrine is "often confused"); *Sonoco Prods. Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 371 (4th Cir. 2003) ("the doctrines of conflict preemption and complete preemption are important, and they are often confused"); *Blab T.V., Inc. v. Comcast Cable Communs., Inc.*, 182 F.3d 851, 854 (11th Cir. 1999) (noting "a substantial amount of confusion" regarding complete preemption doctrine).

"Courts of appeals differ in their willingness to extend the scope of the complete preemption doctrine." *Strong v. Telectronics Pacing Sys.*, 78 F.3d 256, 259 n.1 (6th Cir. 1996). *Compare Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 n.5 (2d Cir. 2003) (holding that Securities Litigation Uniform Standards Act of 1998 triggers

complete preemption); *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1128 (9th Cir. 2002) (same); *Darcangelo v. Verizon Communs., Inc.*, 292 F.3d 181, 187 (4th Cir. 2002) (ERISA completely preempts some state-law claims but not others); *Rosciszewski v. Arete Assocs.*, 1 F.3d 225 (4th Cir. 1993) (holding complete preemption applies to § 301 of the Copyright Act); *Trans World Airlines v. Mattox*, 897 F.2d 773 (5th Cir.) (holding complete preemption applies to § 105(a)(1) of the Airline Deregulation Act), *cert. denied*, 498 U.S. 926 (1990); with *Hurt v. Dow Chem. Co.*, 963 F.2d 1142 (8th Cir. 1992) (refusing to extend complete preemption to the Federal Insecticide, Fungicide, and Rodenticide Act); *Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579 (6th Cir. 1990) (refusing to extend complete preemption to suits against trustees in bankruptcy); *Circle Redmont, Inc. v. Mercer Transp. Co.*, 78 F. Supp. 2d 1316, 1319 (M.D. Fla. 1999) ("Because the Carmack Amendment's language and history do not manifest an intent to make state law claims removable as Carmack claims, the complete preemption doctrine does not apply to give this Court jurisdiction."); *Ben & Jerry's Homemade, Inc. v. KLLM, Inc.*, 58 F. Supp. 2d 315, 318 (D. Vt. 1999) ("Congress has not clearly manifested an intent to make any action involving carrier liability removable to federal court.").

The complete preemption doctrine presents important and recurring questions of federal law. This case presents an ideal vehicle for further clarification of the doctrine.

C. Under the Proper Legal Test, The LHWCA Triggers Complete Preemption.

1. The Text and Structure of the LHWCA

This Court's review is necessary to make clear that the LHWCA creates federal question jurisdiction under the proper conception of the complete preemption doctrine. The text of the LHWCA demonstrates that Congress created a comprehensive statutory scheme and did not intend to permit state-court suits for

damages against stevedore employers. Indeed, the LHWCA is, if anything, broader and more comprehensive than other statutes to which this Court has applied the complete preemption doctrine. Section 301 of the LMRA, for example, merely places jurisdiction of labor disputes in the federal district courts. The LHWCA, on the other hand, contains an exclusive remedy section, which provides that the liability of an employer under the Act "shall be exclusive and in place of all other liability" to the employee and "anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death." § 905(a). This Court has long recognized that "[t]he liability of an employer under the Act is exclusive." *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944). The LHWCA "provides scheduled compensation (*and the exclusive remedy*) for injury to a broad range of land-based maritime workers." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355 (1995) (emphasis added); *see also South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 256 (1940) ("For those employees who are entitled to compensation, the remedy under the Act is exclusive."), *overruled on other grounds by McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991).

In addition to Section 5, the structure of the LHWCA itself confirms that it completely displaces state law. The LHWCA was established as a uniform national program of workers compensation benefits for longshore and harbor workers. The Act utterly controls the sum total of rights and obligations of insurers, employers, and employees. The sheer comprehensiveness of the federal regulatory scheme confirms congressional intent to preempt state-law tort remedies and to prevent state courts from adjudicating LHWCA benefits and coverage issues in potentially inconsistent fashion. Accordingly, under this Court's precedents, the LHWCA plainly creates federal question jurisdiction under the complete preemption doctrine.

The self-executing nature of the LHWCA provides further

evidence that Congress did not intend for state courts to make determinations of LHWCA benefits and coverage. Unlike some workers compensation statutes that require repeated court enforcement, the LHWCA is almost self-policing. The LHWCA provides for automatic payment of benefits and imposes penalties for an employer's failure to pay benefits. 33 U.S.C. §§ 914, 938. The Secretary of Labor has promulgated detailed regulations governing every portion of the Act. *See* 20 C.F.R. §§ 701-704 Disputes as to compensation awards are to be resolved by the Benefits Review Board, with appeals exclusively to the United States Courts of Appeals. It is difficult to imagine a more comprehensive scheme of federal regulation than the LHWCA. The Act leaves no room for state-court involvement.

2. The Legislative History of the LHWCA

The legislative history of the LHWCA confirms that state courts have no role in the statutory scheme. The legislative history repeatedly makes plain congressional intent that longshore workers should be covered by an exclusive workers' compensation scheme and *not* be permitted to file state-court tort suits against stevedore employers.

Initially, judicial decisions extended protection to longshore workers by allowing them to sue in admiralty. *See Atlantic Transportation Co. v. Imbrovek*, 234 U.S. 52 (1914). This development opened the door for inclusion of longshore workers under the remedies of the Jones Act, 46 U.S.C. § 688. *See International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926). As a result, courts excluded longshore workers from state workers' compensation systems. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

Congress reacted by making clear that longshore workers should be limited to administrative compensation remedies and should not be permitted to pursue tort claims under admiralty law. Congress twice tried unsuccessfully to bring longshore workers within state workers' compensation plans, but the courts

held these attempts to be unconstitutional. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924). Determined to provide administrative rather than tort remedies for longshore workers, Congress enacted the original Longshoremen's and Harbor Workers' Compensation Act. Act of March 4, 1927, Pub.L. No. 69-803, codified at 33 U.S.C. § 901 *et seq*. Congress provided that the Act was the sole remedy of the longshore worker against an employer and abolished the Jones Act recovery granted to the longshore worker against the employer by *International Stevedoring Co. v. Haverty, supra. See Swanson v. Marra Brothers, Inc.*, 328 U.S. 1 (1946).

At first, the Act allowed a longshore worker to retain an admiralty action against the vessel (rather than employer). Act of March 4, 1927, Pub.L. No. 69-803, § 33, 44 Stat. 1440. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) (holding that longshore workers were entitled to the protection of the judicially created warranty of "seaworthiness"). Gradually, the "seaworthiness" doctrine approached strict liability. *See* H.R. Rep. No. 92-1441, 92d Cong., 2 Sess. 4-5 (1972); S. Rep. No. 92-1125, 92d Cong., 2d Sess. 8-9 (1972), 1972 U.S. Code Cong. & Admin. News, p. 4698.

However, the availability of an employee's admiralty action *against the vessel* began to threaten the exclusiveness of the Act's remedy *against the employer* because the vessel could pursue a third-party claim against the employer alleging that any injury by the employee was due to the negligence of the stevedoring company and that the stevedoring company had therefore breached its implied warranty of workmanlike performance. In *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), this Court held that such a triangular suit did not violate the exclusive liability provision of Section 5, even though it allowed the longshore worker to recover indirectly from the employer more than could be recovered directly through a workers' compensation claim.

In response, in 1972 Congress enacted important reforms to the LHWCA, in order to reaffirm the exclusiveness nature of the employee's administrative remedy against the employer. See *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 261-62 (1977) (amendments were chiefly for the purpose of strengthening the exclusivity of LHWCA remedies). Congress specifically abolished the seaworthiness standard and eliminated indemnity suits brought against stevedore employers by vessels under *Ryan* and *Sieracki*. Act of October 27, 1972, Pub.L. No. 92-576, § 18, 86 Stat. 1263, amending 33 U.S.C. § 901 *et seq*.

Congress' stated purpose was to remove litigation against employers from the courts. The House Committee Report, for example, expressed concern that judicial interpretations of the Act had led to third-party suits against employers:

> The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs.

H.R.Rep. No. 92-1441 92d Cong., 2d Sess. 5 (1972), U.S.Code Cong. & Admin. News, p. 4702.

The Senate Report concurred. *See* S. Rep. No. 92-1125, 92d Cong., 2d Sess. 9 (1972) ("The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine."). The Senate Report added:

> The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual

benefits for injured workers.

Id. at 4. Congress therefore prohibited longshore workers from bringing claims against vessels under the warranty of seaworthiness allowed by *Sieracki* and relieved stevedoring companies of liability from *Ryan*-type indemnity suits brought by vessels. A vessel's liability to longshore workers was limited to cases where its negligence could be proved.

Further, Congress made clear that the negligence remedy against vessels would not disrupt the uniformity of the statutory scheme. The House Report explained that "the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 8 (1972); *see also* S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12 (1972), U.S. Code Cong. & Admin. News, p. 4705. Congress thus quite deliberately opted to create a *uniform* national system – one that would be substantially disrupted if individual state courts and juries were free to determine issues of coverage and to interpret for themselves the LHWCA's exclusive remedies provision.

In short, in 1972 Congress went to considerable lengths to prevent the circumvention of the LHWCA's exclusive remedy by means of *indirect*, third-party suits against stevedore employers. Congress enacted amendments to override judicial decisions that created the spectre of unwarranted litigation against employers. It is simply unthinkable that Congress meant to permit *direct* state-law tort lawsuits by employees against stevedore employers in state court, for such *direct* actions would blatantly obliterate the exclusive remedy provision of the LHWCA, in a manner much more threatening than the seaworthiness and third-party indemnity suits that Congress barred in 1972.

D. The Decision Below Threatens a Substantial Disruption of the LHWCA Statutory Scheme.

This Court's review is urgently needed because this case presents an important question of federal law that should be settled by this Court. *See* Rule 10(c). The rule followed in this case, if left undisturbed, will threaten substantial disruption of the statutory scheme enacted by Congress in the LHWCA. In fact, this case demonstrates that the disruption is already beginning. This case is undoubtedly merely the beginning of the cascade of state-court tort suits against stevedore employers, following the Fifth Circuit's decision opening the floodgates in *Hernandez*. State-court judges and potentially state-court *juries* will be able to decide questions of LHWCA benefits and coverage for themselves. Different state courts will arrive at different results, subject only to review by this Court via its discretionary certiorari jurisdiction. As this case illustrates, employees will forum shop and will file suit in state courts notorious for their anti-defendant biases and large damages awards. It is no accident that this case was filed in state court in Orleans Parish, Louisiana. That forum has been repeatedly identified as one of the top fourteen "judicial hellholes" in the United States by the American Tort Reform Association.[3]

Recognition of state-law claims will inject numerous potentially conflicting standards into an otherwise uniform national system. For example, in this case, respondent's state-court lawsuit seeks special, general, and exemplary damages. These forms of damages are inconsistent with the LHWCA, which provides compensation according to the employee's weekly wages. *See* 33 U.S.C. §§ 908-09, 910. The LHWCA "operates like ordinary workmen's compensation and operates on a percentage of the earnings of an individual rather than

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[3] *See* American Tort Reform Association, BRINGING JUSTICE TO JUDICIAL HELLHOLES 2 (2002); American Tort Reform Association, BRINGING JUSTICE TO JUDICIAL HELLHOLES 8 (2003).

reimbursing him for his actual injury, and puts a lid on his recovery." 118 Cong. Rec. 36383 (1972) (remarks of Rep. Eckhardt).

Allowing state courts into the administration of the LHWCA will be utterly foreign to the congressional design of the statute. Congress created a centralized scheme administered by the Secretary of Labor through the Director of Office of Workers' Compensation Programs, with review by the Benefits Review Board, and appeals to the United States Courts of Appeals. The clear purpose of this administrative scheme is to provide uniformity and predictability to employers and employees alike. The rule followed in this case will destroy the uniformity and predictability at the heart of the LHWCA.

The exclusivity provision of Section 5 is a vital part of the LHWCA. "[T]he Act was not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other. Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 461 U.S. 624, 635 (1983) (citing H. R. Rep. No. 1767, 69th Cong., 2d Sess., 19-20 (1927)).

The rule followed in this case will upset the balance struck by Congress and will render the broad preemptive effect of Section 5 a virtual nullity. An important purpose of the LHWCA is to "provide employers with definite and lower limits on potential liability than would have been applicable in common-law tort actions for damages." *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 281 (1980). "The use of a schedule of fixed benefits as an exclusive

remedy in certain cases is consistent with the employees' interest in receiving a prompt and certain recovery for their industrial injuries as well as with the employers' interest in having their contingent liabilities identified as precisely and as early as possible." *Id.* at 282.

Accordingly, the rule followed by the decisions below will substantially disrupt the LHWCA's statutory scheme. This Court's review is urgently needed on this important question of federal law.

E. Section 1447(d) Does Not Preclude Review.

Section 1447(d) of Title 28 provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." 28 U.S.C. § 1447(d). Neither the Fifth Circuit's order nor respondent's opposition to the petition for writ of mandamus cited § 1447(d). Nonetheless, even if the Fifth Circuit had expressly relied upon § 1447(d), it would not bar review in this case.

The issue of the proper construction of the LHWCA – and whether it displaces respondent's state-law tort remedy – is antecedent to the question of subject-matter jurisdiction. Indeed, it is separate from the issue of remand: under SSA Gulf's view, the LHWCA required that the district court enforce the exclusivity provisions of the LHWCA by dismissing the plaintiff's petition for damages, not by remanding it to the state court. The issue is not simply the jurisdictional question of whether respondent's state-law tort claims should proceed in federal court or in state court; the issue is whether the tort claims may proceed *at all* in *any* court in light of the LHWCA's exclusivity provisions mandating their dismissal. *See Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 143 (1934) (appellate court had power to review issue which "preceded that of remand"); *Borneman v. United States*, 213 F.3d 819, 825 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (fact that district court's decision cited § 1447(c) is not sufficient to trigger §

1447(d) because "[t]he district court's conclusion that it did not have subject matter jurisdiction was premised on two antecedent decisions that are both judicially reviewable and appealable"); *Aliota v. Graham*, 984 F.2d 1350, 1353 (3d Cir.) (review not barred where a statutory issue under 28 U.S.C. § 2679(d) was the impetus behind the remand, but was also "separate from and logically preceded the question of remand"), *cert. denied*, 510 U.S. 817 (1993); *Mitchell v. Carlson*, 896 F.2d 128, 132-33 (5th Cir. 1990) (finding issue separable and reviewable under *City of Waco*); *In re Adams*, 809 F.2d 1187, 1188-89 (5th Cir. 1987) (same regarding the dismissal of bankruptcy appeal); *Gallea v. United States*, 779 F.2d 1403, 1404 (9th Cir. 1986) (same regarding dismissal of United States in tort suit).

Section 1447(d) is not automatically triggered merely because the district court's remand order cited § 1447(c) and was purportedly based on lack of subject-matter jurisdiction. *See Poore v. American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1291 (11th Cir. 2000) (remand order based on lack of subject-matter jurisdiction reviewable where "the district court exceeded its authority under § 1447(c)"); *Xiong v. Minnesota*, 185 F.3d 424, 427 (8th Cir. 1999) (where district court held that it lacked subject matter jurisdiction but "case law dictated that jurisdiction was proper at the time of removal," § 1447(d) was no bar to review: "Because the district court remanded a properly removed cause on grounds the court lacked authority to consider, the remand order is reviewable on appeal.").

Accordingly, § 1447(d) does not preclude review of the LHWCA question presented by this case. Otherwise, federal appellate courts would lack authority to protect comprehensive congressional schemes from interference by state courts. *See Powers v. Southland Corp.*, 4 F.3d 223, 229-30 (3d Cir. 1993) (holding that § 1447(d) was no bar to review because, "if there is independent appellate jurisdiction over an issue under the governing federal statutes, the fact that the district court may have remanded the case cannot deprive the court of appeals of

the jurisdiction granted to it by Congress"; "the essence of the defendant federal employee's complaint was that she would be subjected to suit in state court although she had a statutory right to be immune from suit").

The Fourth Circuit recognized the same principle in *Shives*, 151 F.3d at 167. The Fourth Circuit recognized that the LHWCA coverage question was an antecedent issue within the power of the court of appeals to resolve, because leaving the case in the state courts was precisely the harm that Congress was trying to avoid in the statutory scheme:

> If we were to dismiss this appeal as unreviewable under 28 U.S.C. § 1447(d), then we would be leaving in place a remand order which would commit to the state courts the decision of whether the LHWCA provided coverage to the employee. To follow that course would thus deprive the federal courts of their proper role in resolving this important issue and would circumvent Congress' intent that LHWCA coverage issues be resolved in the first instance by the Department of Labor and ultimately in the federal courts of appeals. Thus, because the coverage question of the LHWCA is a conceptual antecedent for the district court's remand order, it would appear that we are not prohibited by § 1447(d) from reviewing that order.

Id. at 167. "If we have any doubt about the correctness of this analysis, we are authorized in these circumstances to issue a writ of mandamus. To avoid forfeiting the federal courts' role of reviewing LHWCA coverage issues is one of those extraordinary situations envisioned in [*Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976)] for exercise of the writ." *Id.* at 167-68.

Precisely the same reasoning is applicable here. *See also Kircher v. Putnam Funds Trust*, 373 F.3d 847, 850 (7th Cir. 2004) (finding Section 1447(d) no bar to appellate review because the "specific substantive decision in securities litigation

must be made by the federal rather than the state judiciary", and "if the remand is deemed non-appealable, then a major substantive issue in the case will escape review"); *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 844 (3d Cir. 1991), *cert. denied,* 503 U.S. 906 (1992) (district court remand order based on constitutionality of statute was not the kind of remand order meant to be insulated by § 1447(d)); *Nasuti v. Scannell*, 906 F.2d 802, 808 (1st Cir. 1990) ("the instant remand order is reviewable by mandamus, since issuance of a remand order at this point in the proceedings was entirely outside the district court's statutory authority" as expressed in the Westfall Act).

Hence, § 1447(d) does not provide a reason to deny review. If anything, any conflict between the Fifth Circuit and the other courts of appeals regarding the interpretation of § 1447(d) would provide a further reason to grant review.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, this Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004).

Respectfully submitted.

RICHARD P. SALLOUM
FRANKE, RAINEY & SALLOUM
Post Office Drawer 460
Gulfport, MS 39502
(228) 868-7070

JONATHAN S. MASSEY
Counsel of Record
JONATHAN S. MASSEY, P.C.
3920 Northampton St. N.W.
Washington, D.C. 20015
(202) 686-0457

IRA J. ROSENZWEIG
ADAMS, HOEFER, HOLWADEL
& ELDRIDGE, LLC
Pan American Life Center
601 Poydras St., Suite 2490
New Orleans, LA 70130
(504) 581-2606

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30679

IN RE: SSA GULF TERMINALS, INC., formerly known as Ryan-Walsh Stevedoring, Inc.

Petitioner,

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Louisiana, New Orleans

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

IT IS FURTHER ORDERED that petitioner's motion for leave to file petition for writ of certiorari filed in related case 04-30679 into this case is DENIED.

/s/

DATED: October 5, 2004

Appendix B

MINUTE ENTRY
J. ENGELHARDT
AUGUST 5, 2004

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ROOSEVELT MAGEE	CIVIL ACTION
VERSUS	NO. 04-1471
AMERICAN SUGAR REFINING, INC., ET AL.	SECTION "N" (5)

Before the Court is a Motion to Remand filed by plaintiff Roosevelt Magee on June 23, 2004. (Rec. Doc. 25).

Having reviewed the parties' submissions, the record and the applicable law, IT IS ORDERED that plaintiff's motion to remand is GRANTED for the reasons set forth in Judge Africk's July 8, 2004 Order and Reasons in *Hernandez v. Todd Shipyards*, 2004 WL 1543184 (E.D. La.). Accordingly, pursuant to 28 U.S.C. § 1447(c), this action is REMANDED to the Civil District Court for the Parish of Orleans for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that plaintiff's motion for costs, expenses, and sanctions is DENIED. *See id.*

/s/

Date of Entry: August 6, 2004

(2)

Supreme Court, U.S.
FILED
FEB 2 - 2005
OFFICE OF THE CLERK

No. 04-740

IN THE
Supreme Court of the United States

SSA GULF, INC.,

Petitioner,

v.

ROOSEVELT MAGEE,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN M. JUPITER
LEBLANC & WADDELL
202 St. Charles Avenue
Suite 3204
New Orleans, LA 70170
(504) 523-9900

MICHAEL T. KIRKPATRICK
Counsel of Record
PUBLIC CITIZEN LITIGATION GROUP
1600 20th St., NW
Washington, DC 20009
(202) 588-1000

February 2005

QUESTION PRESENTED

Whether the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, *et seq.*, allows removal on the basis of federal question jurisdiction because it completely preempts all state-law tort suits by longshore employees against stevedore employers.

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioner seeks this Court's review of an unreported order of the Fifth Circuit summarily denying its petition for a writ of mandamus to review the district court's unreported order remanding this case to state court under 28 U.S.C. § 1447(c). The district court below found that it lacked federal question jurisdiction for the reasons set forth in its earlier unreported order in *Hernandez v. Todd Shipyards,* 2004 WL 1543184 (E.D. La. 2004). Petitioner recently sought a writ of certiorari in *Hernandez* relying on the same arguments it makes here, but the Court denied the writ. *SSA Gulf, Inc. v. United States Dist. Court for the Eastern Dist. of Louisiana*, 125 S. Ct. 508 (2004). The Court should also decline to review the unreported, single-page orders at issue here, because the petition is nothing more than an attempt to get a second chance at certiorari in *Hernandez*.[1]

As an initial matter, the petition should be denied because 28 U.S.C. § 1447(d) prohibits appellate review of remand orders based on a lack of subject matter jurisdiction, and every circuit that has addressed the issue has concluded that remand for lack of complete preemption is unreviewable.

Even if § 1447(d) did not prohibit appellate review of the order at issue, the petition should be denied because there is no circuit split on whether LHWCA completely preempts all

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[1] Petitioner errs by claiming that "[t]he district court entered an order of remand without deciding whether the LHWCA completely preempts state-law claims against stevedore employers . . . ." Pet. at 4. In fact, the district court adopted the decision in *Hernandez*, *see* Pet. App. 2a, and *Hernandez* held that LHWCA does not satisfy the requirements for complete preemption. *Hernandez*, 2004 WL 1543184, at *5.

state-law causes of action related to workplace injuries suffered by longshore employees. The cases cited by petitioner as evidence of a conflict do not even address the complete preemption doctrine, and petitioner does not cite a single case holding that LHWCA completely preempts all torts arising from maritime employment. Petitioner implies that the exclusive remedy provision of LHWCA preempts all other causes of action, but petitioner cites no authority equating the exclusive remedy provision with complete preemption. To the contrary, the district court's determination that LHWCA does not completely preempt all state law causes of action such that it triggers federal question jurisdiction is based on a sound application of the relevant precedent, and it does not conflict with this Court's decisions regarding the complete preemption doctrine.

Finally, petitioner claims that the denial of certoriari in *Hernandez* has caused a "flood of new cases" against stevedore employers in "notorious anti-defendant venues," but petitioner cites only this case as evidence of the "flood." Pet. at 6. Even if there were such a flood, it would not disrupt the LHWCA benefits scheme as forecast by petitioner, because federal preemption can still be raised as a defense in state court.

STATEMENT

Respondent Roosevelt Magee worked as a longshoreman for petitioner (and/or its predecessor(s)) and other stevedoring companies, loading and unloading cargo at the Port of New Orleans. In connection with his work, Magee was exposed to asbestos that, he alleges, caused him to contract asbestos-related diseases, including lung cancer. Magee filed suit in Louisiana state court against petitioner and others, seeking damages for his injuries. Magee never pursued a claim

under LHWCA, and his lawsuit did not invoke LHWCA or any other federal cause of action. Rather, Magee based his case entirely on state-law tort theories.

REASONS FOR DENYING THE WRIT

I. The Petition Should Be Denied Because 28 U.S.C. § 1447(c) Precludes Review.

"Congress has placed broad restrictions on the power of federal appellate courts to review district court orders remanding removed cases to state court." *Things Remembered v. Petrarca*, 516 U.S. 124, 127 (1995). The district court's remand order in this case falls squarely within the prohibition on appellate review contained in 28 U.S.C. § 1447(d). As a consequence, this Court lacks jurisdiction over the merits of the case. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review . . . .") (internal quotation marks omitted).

"As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction—the grounds for remand recognized by § 1447(c)—a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d)." *Things Remembered*, 516 U.S. at 496. Here, the district court explicitly remanded the case "pursuant to 28 U.S.C. § 1447(c) . . . for lack of subject matter jurisdiction." Pet. App. 2a. "Section 1447(d) thus compels the conclusion that the District Court's order is not 'reviewable on appeal or otherwise.'" *Things Remembered*, 516 U.S. at 128 (quoting *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (per curiam)).

A. The *City of Waco* Exception Does Not Apply, and Every Circuit That Has Addressed the Issue Has Concluded That A Remand for Lack of Complete Preemption Is Not Reviewable.

Petitioner attempts to avoid § 1447(d) by arguing that the district court's ruling concerning complete preemption is an independently reviewable "antecedent," separate from the question of subject matter jurisdiction. Pet. at 24-25. In support of this theory, petitioner relies on a 1934 decision of this Court, *City of Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140 (1934). There, the district court had "entered a single decree embodying three separate orders." *Id.* at 142. One of the orders granted the Fidelity Company's motion to dismiss a cross-complaint by the City of Waco; another order held that the court lacked jurisdiction following the dismissal (because there was no diversity among the remaining parties) and remanded the case to state court. *Id.* The City appealed, "not from the order of remand, but from [the order] dismissing its action against the Fidelity Company." *Id.* The Court acknowledged that "no appeal lies from the order of remand," but held that the dismissal order was appealable because "in logic and fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause." *Id.* at 143.

Petitioner cites a handful of cases in which courts have exercised appellate jurisdiction under *City of Waco*. Conspicuously absent, however, is any case in which complete preemption was asserted as a basis for removal. In fact, every court of appeals to have addressed the issue has concluded that a remand based on a lack of complete preemption is insulated from review under § 1447(d):

- **Fourth Circuit:** In *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 321-22 (4th Cir. 1993), the Fourth Circuit rejected the suggestion that *City of Waco* permitted it to exercise appellate jurisdiction over a district court's conclusion that removed state law claims were not completely preempted under the LMRA or ERISA. "The district court's determination that neither ERISA nor the LMRA preempted [plaintiff's] state law claim is inseverable from its determination that it lacked jurisdiction. Because complete preemption was the basis for the district court's jurisdiction, the court's findings regarding preemption and jurisdiction are indistinguishable. The preemption findings were merely 'subsidiary legal step[s] on the way to its determination that the case was not properly removed.'" *Id.* at 321 (quoting *Ward v. FDIC*, 881 F.2d 564, 566 (8th Cir. 1989)).

- **Ninth Circuit:** In *Whitman v. Raley's Inc.*, 886 F.2d 1177 (9th Cir. 1989), the Ninth Circuit explained that "[a] remand based on lack of 'complete preemption' is a remand required by 28 U.S.C. § 1447(c)" and is therefore insulated by § 1447(d) from appellate review. *Id.* at 1181. "If the federal court rules that the claim is not 'completely preempted,'" the court explained, "then the federal court has no jurisdiction to rule on a substantive defense and remand is required. The substantive defense of preemption is then a matter for the state court to determine as a part of the trial proceedings." *Id.*

- **First Circuit**: In *Gonzalez-Garcia v. Williamson Dickie Mfg. Co.*, 99 F.3d 490, 492 (1st Cir. 1996), the First Circuit "interpret[ed] the district court's order of

remand [based on a lack of preemption] as a determination that it lacked subject matter jurisdiction over the removed case because no federal claim had been presented to invoke the court's federal question jurisdiction." The district court's rejection of the preemption argument "was a link in the chain of reasoning. But the preemption ruling, rather than being apart from the question of subject matter jurisdiction, is necessary to determine whether such jurisdiction existed." *Id.* (internal citations and quotation marks omitted).

- **Fifth Circuit:** In *Smith v. Texas Children's Hosp.*, 172 F.3d 923, 926 (5th Cir. 1999), the Fifth Circuit held that "the district court's conclusion regarding the lack of complete preemption is insulated from appellate review by § 1447(d)." The Fifth Circuit has also rejected an argument that preemption-related remands are reviewable based on *City of Waco*. *See Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406 (5th Cir. 1991) ("In [*City of Waco*], the 'separable portion' of the order denied a right not subject to review by the state court. . . . [T]he state court would not reconsider the dismissal of the cross-action . . . . In this case, by contrast, because we interpret the remand order as jurisdictional, the state court will have an opportunity to consider the appellants' preemption defense and the district court's order will have no preclusive effect. Because we conclude that § 1447(d) bars us from reviewing the remand order, we do not reach the appellants' arguments on the preemption issue.").

- **Eleventh Circuit:** In *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539 (11th Cir. 1987), the

> Eleventh Circuit, in a brief *per curiam* opinion, held that a district court's remand based on the lack of ERISA preemption was unreviewable. The preemption question was "related to the question of jurisdiction; the remand order did not affect the substantive rights of the parties. In particular, the [district] court did not reach the merits of the preemption argument. The state court may in fact rule that ERISA does preempt appellees' state law claims and that appellees must proceed, as appellants contend, under . . . ERISA." *Id.* at 1540.

The law of other circuits is fully consistent with these decisions. *See Spielman v. Merrill Lynch*, 332 F.3d 116, 131 (2d Cir. 2003) ("[I]f the district court determines that the criteria for complete preemption have not been met, then the plaintiff's state law suit does not arise under federal law, the district court lacks federal question jurisdiction, and the case must be remanded to the state court for lack of jurisdiction. The defendant cannot appeal because of 28 U.S.C. § 1447(d).") (citations omitted); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341 (6th Cir. 1993) (adopting analysis of Ninth, Fifth and Eleventh Circuits); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 225 n.7 (3d Cir. 1995) ("[W]ere the district court considering preemption as a basis to assert jurisdiction in the first instance, the bar of § 1447(d) may well apply and it is not clear that the *Waco* exception could be used. This would present a significant jurisdictional problem given the bar to review in § 1447(d)."); *cf. Adkins v. Illinois Cent. RR. Co.*, 326 F.3d 828, 833 (7th Cir. 2003) ("[A] district court's conclusion that an initial acceptance of a claim of 'complete preemption' was erroneous[] reveal[s] that the federal court never had jurisdiction of the case to begin with.").

By contrast, the decisions applying *City of Waco* cited by petitioner all involve situations, as in *City of Waco* itself, in which an order of dismissal preceded and was wholly distinct from the order remanding the case. *See Nutter*, 4 F.3d at 321 ("Most decisions applying *City of Waco* have involved orders dismissing some party or claim."). This is because "[t]he purpose of the *City of Waco* doctrine is to prevent one of the parties from being prejudiced by a claim of preclusion made after the remand to the state courts." *Ward v. FDIC*, 881 F.2d 564, 566 (8th Cir. 1989).[2]

The ruling in this case, however—that LHWCA did not completely preempt the state law claims—is not the final word on the issue of preemption: The district court itself concluded that petitioner was free to raise a substantive preemption defense based on LHWCA's exclusive remedy provision in state court, *see Hernandez*, 2004 WL 1543184, at *5, and many other decisions are in accord. *See, e.g.*, *Whitman*, 886 F.2d at

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[2] Three of the decisions cited in the petition are based on unique procedural circumstances arising under the Westfall Act, 28 U.S.C. § 2679(d)(2), which provides that the Attorney General's certification that a federal employee sued in a state court tort suit was acting within the scope of the employee's office "shall conclusively establish the scope of office or employment for purposes of removal." *See Borneman v. United States*, 213 F.3d 819 (4th Cir. 2000); *Aliota v. Graham*, 984 F.2d 1350 (3d Cir. 1993); *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990). In these cases, "[t]he district court dismissed the United States as a defendant and resubstituted [the individual officer defendant] while it still had control of the case" and "[o]nly then did the court remand the case to state court." *Mitchell*, 896 F.2d at 133.

1181 ("The federal court's ruling on 'complete preemption' has no preclusive effect on the state court's consideration of the substantive preemption defense. This, of course, is particularly appropriate because the jurisdictional decision of lack of complete preemption is insulated by section 1447(d) from appellate review."); *Soley*, 923 F.2d at 410 ("[B]ecause we interpret the remand order as jurisdictional, the state court will have an opportunity to consider the appellants' preemption defense and the district court's order will have no preclusive effect."); *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 405 (7th Cir. 2001) ("[U]pon remand to state court, that court will be free to consider the question whether the Federal Aviation Act preempts the claim Vorhees is attempting to present here—a claim on which our jurisdictional ruling rejecting 'complete preemption' or occupation of the field has no bearing."); *Gonzalez-Garcia*, 99 F.3d at 492; *Nutter*, 4 F.3d at 321; *Glasser*, 806 F.2d at 1540. Thus, petitioner's "antecedent order" theory based on *City of Waco* has no support, and petitioner's suggestion that there is a "conflict between the Fifth Circuit and the other courts of appeals regarding the interpretation of § 1447(d)," Pet. at 27, is simply wrong.

B. The *Thermtron* Exception Does Not Apply.

Petitioner also places heavy reliance on the Fourth Circuit's decision in *Shives v. CSX Transportation*, 151 F.3d 164, 167 (4th Cir. 1998), which purported to apply this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). *See* Pet. at 26. Neither *Shives* nor *Thermtron*, however, supports appellate jurisdiction in this case.

First, *Shives* did not involve a remand based on a lack of complete preemption by LHWCA, and the Fourth Circuit

itself has concluded that a remand based on a lack of complete preemption is unreviewable. *See Nutter*, 4 F.3d at 321-22.[3]

Second, regardless of whether the *Thermtron* exception was properly applied in *Shives*, it does not apply here. *Thermtron* held that § 1447(d) did not preclude appellate review of orders by a district court judge who had remanded cases to the state court solely because his docket was too crowded. The Court explained that the § 1447(d) ban on review "on appeal or otherwise" must be read *in pari materia* with 28 U.S.C. § 1447(c), so that "only remand orders issued under § 1447(c) and invoking the grounds specified therein" are immune from review. 423 U.S. at 346. The Fourth Circuit in *Shives* construed the district court's remand as an order based on FELA's non-removal provision rather than a remand based

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[3] The plaintiff in *Shives* sought relief for his workplace injury by initiating two different proceedings under two mutually exclusive federal statutes. He brought a claim in Maryland state court under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, and he filed an administrative claim with the Department of Labor under LHWCA. *Shives*, 151 F.3d at 166. The determination of which claim would proceed turned on whether, at the time of his work-related injury, the plaintiff was engaged in "maritime employment" within the meaning of LHWCA, 33 U.S.C. § 902(3). Following removal, the district court found that the plaintiff was not covered by LHWCA and remanded the case to allow the FELA claim to proceed in state court. The Fourth Circuit reversed, holding that the plaintiff was engaged in maritime employment, and therefore his FELA case should be dismissed and his LHWCA claim should proceed through the administrative process. *Shives*, 151 F.3d at 171.

on § 1447(c): "In this case, the district court could not rule, in a strict sense, under § 1447(c) that it was without jurisdiction because federal courts have concurrent jurisdiction over FELA claims. *See* 45 U.S.C. 56. Rather, it ruled properly that an FELA claim could not be *removed* from a state court to a federal court. *See* 28 U.S.C. 1445(a)." *Shives*, 151 F.3d at 167 (emphasis in original).

In sum, because it is undisputed that the district court's order in this case relied exclusively on § 1447(c), *Shives* is inapposite and the remand is not reviewable. *Thermtron*, 423 U.S. at 343 ("If a trial judge purports to remand a case on the ground that it was removed [for the reasons specified in section 1447(c)] his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise."). For these reasons, the Fifth Circuit did not have appellate jurisdiction, and review should be denied on that basis alone.

II. Petitioner Fails to Cite a Single Case Holding That LHWCA Completely Preempts All State-Law Causes of Action Related to Workplace Injuries Suffered by Longshore Employees.

Even if § 1447(d) did not prohibit appellate review of the remand order at issue, the petition should be denied because there is no circuit split on the question presented. Petitioner seeks review because it is dissatisfied with the district court's finding that LHWCA does not completely preempt state law tort suits by longshore employees against stevedore employers. But try as it might, petitioner is unable to cite a single case finding that LHWCA satisfies the complete preemption doctrine. Instead, petitioner claims that there is a "conflict" and "tension" between the decision below and rulings in other circuits, but the cases petitioner cites present no circuit split

regarding complete preemption. *See* Pet. at 9 (citing nine case, none of which mentions complete preemption).

Petitioner errs by conflating the exclusive remedy provision of LHWCA with complete preemption doctrine. *Id.* The decision below would conflict with the cases cited by petitioner only if the court had held that LHWCA is not the exclusive remedy for certain workplace injury claims brought by longshore employees against their employers, but because that issue is not germane to the complete preemption analysis, the court below had no reason to reach it. Thus, it is premature for petitioner to seek certiorari on the issue of whether § 905(a) bars respondent from any state tort recovery from petitioner. That question is fact-intensive, and can be resolved only after fact development in the trial court. *See, e.g., Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980) (LHWCA does not bar all state remedies against the employer); *Jones & Laughlin Steel v. Pfeifer*, 462 U.S. 523, 530 (1983) (§ 905(a) does not bar negligence suits against a stevedore employer where the employer is also the vessel owner); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426 (1985) ("[T]here will always be a boundary to coverage, and there will always be people who cross it during their employment."); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 87 (1991) (LHWCA does not provide the exclusive remedy for harbor workers who are also members of a vessel's crew); *Sample v. Johnson*, 771 F.2d 1335, 1346 (9th Cir. 1985) (noting that exclusive remedy provision of § 905(a) does not apply to claims of intentional injury). Indeed, the decision of the district court in *Hernandez*, adopted by reference by the district court below, concludes that although LHWCA does not satisfy the complete preemption doctrine, the exclusive remedy provision of LHWCA may provide a preemption defense that can be raised in state court.

Hernandez, 2004 WL 1543184, at *5, citing *Garcia v. Amfels, Inc.*, 254 F.3d 585, 588 (5th Cir. 2001).

III. The District Court's Determination That LHWCA Does Not Completely Preempt All State-Law Causes of Action Is Based on a Sound Application of the Relevant Precedent and Does Not Conflict with this Court's Decisions Regarding the Complete Preemption Doctrine.

Contrary to petitioner's assertion, the court below did not apply "an improper legal test that conflicts with governing precedent of this Court . . . ." Pet. at 14. Rather, the court below found that LHWCA did not, in fact, satisfy the governing test for complete preemption, but that petitioner could nevertheless raise preemption as a federal defense in the state court. *See Caterpillar Inc., v. Williams*, 482 U.S. 386, 393 (1987) ("[I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption.") (emphasis in original, citing *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 12 (1983)). Petitioner claims that the district court decision, by relying on *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157, 1164-65 (5th Cir. 1989), conflicts with this Court's decision in *Beneficial National Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003). Pet. at 14. Petitioner is wrong. The portion of *Aaron* quoted by petitioner was expressly *not* followed by the district court below because, in *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 775-76 (5th Cir. 2003), the Fifth Circuit modified its complete preemption analysis to conform with *Beneficial*. The district court decision explains this modification in detail and expressly does not follow the part of *Aaron* "arguably undermined by *Hoskins*." *Hernandez*, 2004 WL 1543184, at *4. However, petitioner

ignores this discussion and thus erroneously claims that the court below applied an obsolete legal standard.

Petitioner next urges this Court to grant review "to continue the clarification of the complete preemption doctrine." Pet. at 15. But the discussion that follows reveals that petitioner seeks not *clarification*, but rather *expansion* of the doctrine. Under the expansion urged by petitioner, any federal statute with an exclusive remedy provision that might form the basis for a federal preemption defense in state court would become a source of complete preemption. The sweeping change urged by petitioner would make complete preemption the rule rather than the exception.

Indeed, in arguing that the "sheer comprehensiveness of the federal regulatory scheme . . . creates federal question jurisdiction under the complete preemption doctrine," Pet. at 17, petitioner urges a position already rejected by this Court in *Southwest Marine,* a decision petitioner fails to cite. In *Southwest Marine,* this Court found that "[t]he administrative proceedings outlined under the LHWCA in no way approach the NLRA's complex and interrelated federal scheme of law, remedy and administration requiring pre-emption in those cases [and] [n]either is it essential to the administration of the LHWCA that resolution of the question of coverage be left in the first instance to agency proceedings in the Department of Labor." 502 U.S. at 91 (internal quotation marks and citations omitted).

IV. The Court Should Not Review this Case Based on Petitioner's Unsubstantiated Forecast of a "Flood" of New State Court Cases.

Finally, petitioner predicts the decision below will cause a flood of new cases that will disrupt the LHWCA benefits scheme by requiring defendant employers to raise LHWCA as a preemption defense to state court tort suits. Pet. at 6. But petitioner cites only this case and *Hernandez* as evidence of the flood, and petitioner's warning of a wave of conflicting state court decisions on whether such suits can be maintained is undermined by petitioner's assertions regarding the strength of LHWCA's exclusive remedy provision.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

MICHAEL T. KIRKPATRICK
Counsel of Record
PUBLIC CITIZEN LITIGATION GROUP
1600 20th St., NW
Washington, DC 20009
(202) 588-1000

STEVEN M. JUPITER
LEBLANC & WADDELL
202 St. Charles Avenue, Suite 3204
New Orleans, LA 70170
(504) 523-9900

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IN THE

Supreme Court of the United States

SSA GULF, INC.,

Petitioner,

v.

ROOSEVELT MAGEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RICHARD P. SALLOUM
FRANKE, RAINEY & SALLOUM
Post Office Drawer 460
Gulfport, MS 39502
(228) 868-7070

IRA J. ROSENZWEIG
ADAMS, HOEFER, HOLWADEL
& ELDRIDGE, LLC
Pan American Life Center
601 Poydras St., Suite 2490
New Orleans, LA 70130
(504) 581-2606

JONATHAN S. MASSEY
Counsel of Record
JONATHAN S. MASSEY, P.C.
7504 Oldchester Rd.
Bethesda, MD 20817
(301) 915-0990

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

RULE 29.6 STATEMENT

Petitioner's Rule 29.6 Statement is set out at page iii of the Petition, and there are no amendments to that statement.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case presents the question whether the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"), wholly displaces and preempts state tort damages claims by longshore employees against their stevedore employers, so as to trigger federal question jurisdiction pursuant to 28 U.S.C. § 1331.

The Brief in Opposition ("BIO") argues that this Court should deny review in this case because it recently denied review of a related cert. petition, No. 04-327, *SSA Gulf, Inc. v. United States Dist. Court for the Eastern Dist. of Louisiana*, 125 S. Ct. 508 (2004) ("*Hernandez*"). But the BIO simply ignores the showing in the Petition that this Court has often granted certiorari after initially denying the writ in a previous case presenting the same legal question. *See* Pet. 6-7 n.1. This Court should follow that course here. The Fifth Circuit has demonstrated that its decision in *Hernandez* was not aberrational. The Fifth Circuit will continue to allow state-court plaintiffs to evade the exclusivity provision of the LHWCA and to frustrate the statutory scheme crafted by Congress.

Indeed, the Fifth Circuit's decision stands as an open invitation to plaintiffs to file suit against stevedoring defendants in one of the leading "judicial hellholes" in the country, in the words of the American Tort Reform Association. *See* Petition at 22 n.3. Respondent's suggestion that thus far there has been no "flood" of state-court cases (BIO 15) is disingenuous. The flood is already beginning, and nothing in the Fifth Circuit's decision presents a limiting principle that would stop it.

1. The BIO fails to come to grips with the central issue in this case: the need for *federal courts*, rather than *state courts and juries*, to decide questions of scope and coverage under the LHWCA. Indeed, the BIO takes the position that such issues may be resolved in the state courts. The BIO maintains that "whether § 905(a) bars respondent from any state tort recovery

from petitioner" is a "fact-intensive" question that "can be resolved only after fact development in the trial court" – i.e., the *state* court. BIO 12.

Such a suggestion is completely inconsistent with the statutory scheme designed by Congress. Tellingly, respondent offers no answer at all to the extensive showing in the Petition (pp. 16-21) that the text, structure, and legislative history of the LHWCA uniformly demonstrate that Congress intended that questions under the Act, including coverage decisions, would be decided by *federal* rather than *state* courts. This Court's review is therefore urgently required.

2. The BIO acknowledges that "[t]he decision below would conflict with the cases cited by petitioner" if "the court had held that LHWCA is not the exclusive remedy for certain workplace injury claims brought by longshore employees against their employers." BIO 12.

This concession demonstrates the need for certiorari. Although the district court, following the decision in *Hernandez v. Todd Shipyards*, 2004 WL 1543184 (E.D. La. 2004), did not reach petitioner's Rule 12(b)(6) motion to dismiss based on the exclusive remedy provisions of the LHWCA, respondent does not deny that the practical effect of the district court's ruling will be to eliminate the exclusively federal forum designed by Congress. Under the decisions of the courts below, state-court judges and state-court juries will decide the issue of the LHWCA's preemptive scope. For this reason alone, this Court's review is urgently needed in order to protect the statutory scheme crafted by Congress from impermissible interference by the state courts.

Further, it is inconsistent for respondent to argue now that the exclusivity issue was somehow not before the district court. Respondent himself squarely raised the issue. For example, in his petition for damages, respondent alleged that his "theory of recovery for negligence" against his stevedoring employers was

that "the employer defendants negligently failed in the performance of their delegated responsibilities and/or actual undertakings to provide Plaintiff with safe premises and cargo." ¶ 79. Such a state-law negligence claim cannot be reconciled with the exclusivity provision of the LHWCA.

In fact, respondent's persistent position in this litigation has always been that the LHWCA is not an exclusive remedy for injured longshore workers. In his motion to remand in the district court, respondent argued that "[t]his case should be remanded to state court because the language of the 1972 amendments to the [LHWCA] cannot be fairly understood as preempting state remedies." Motion to Remand at 6. "SSA Gulf cannot show that the LHWCA is the exclusive remedy." *Id.* "LHWCA contains no express declaration of Congressional intent to prohibit states from providing compensation to injured workers in lieu of, or in addition to the benefits provided under the LHWCA." *Id.* "[A]n injured worker has the option of pursuing a claim for remedies under either state law or federal law. In this case, plaintiff chose to pursue a state remedy for his injuries, which include actions in tort." *Id.* at 7. Respondent urged the district court to follow the decision of the Louisiana Supreme Court in *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), *appeal dismissed*, 434 U.S. 803 (1977), which expressly *rejected* the settled propositions that "the 1972 amendments to the [LHWCA] have the effect of preempting the power of this state to provide a compensation remedy to maritime workers injured on our soil"; that "the need for uniformity in the field of admiralty law demands that federal law operate exclusively as to covered workers"; and that "the history and wording of the [LHWCA] evidence a Congressional intent that federal law in this area be preeminent." *Id.* at 1215. The Louisiana court opined: "We do not agree with any of these contentions." *Id.*

Having urged this view on the district court below, and having consistently contended throughout the proceeding that

this case should be remanded to the state courts because the LHWCA is not an exclusive remedy, respondent now seeks to switch gears and argue that the exclusivity issue is not presented by this case. Respondent cannot have it both ways.

3. The BIO contends that the Fifth Circuit's decision does not conflict with governing precedent. The BIO is wrong. The decision below conflicts with a holding of the Fourth Circuit, as well as with governing precedent from this Court regarding both the LHWCA and the "complete preemption" doctrine.

First, respondent fails to distinguish *In re CSX Transportation, Inc. v. Shives*, 151 F.3d 164 (4th Cir. 1998). BIO 10 n.3. Indeed, respondent admits that *Shives* held that an employee covered by the LHWCA was required to pursue compensation under the Act, to the exclusion of other claims. BIO 10 n.3. Further, the Fourth Circuit squarely held that "[t]he question of whether the LHWCA applies to a work-related injury is exclusively a federal question which Congress never intended for state courts to resolve." 151 F.3d at 167. Under respondent's view, the same inquiry would be conducted by a state court, not a federal court. There can be no doubt that, if respondent's state-court complaint had been filed in the Fourth Circuit, it would have been removed to federal court and dismissed. Under the decisions below, state-court complaints filed in the Fifth Circuit, if removed to federal court, will be remanded to state court instead. There is a thus a stark circuit conflict in this case.

Next, the Fifth Circuit's decision is inconsistent with this Court's decisions recognizing the exclusive nature of the LHWCA remedy. The BIO cites a handful of cases in an effort to suggest that the exclusivity provision of the LHWCA (§ 905(a)) would permit respondent to pursue a state-court suit for tort damages. BIO 12. Yet this Court this Court has long taken precisely the opposite view, squarely holding that "[t]he liability of an employer under the Act is exclusive." *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944). With respect to an

employer, "the LHWCA expressly pre-empts all other claims." *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001); *see also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 261 (1979); *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 111-13 (1974); *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-86 (1952). At least eight circuits have similarly held that Congress intended for the LHWCA to serve as the *exclusive* remedy for longshore employees against their stevedore employees.[1]

The cases cited in the BIO (at 12) are inapposite because they do not involve state-court tort suits by a stevedore against his employer. For example, *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), concerned the administrative remedy of a state workers compensation award to a stevedore – not a state-law tort claim against the employer. *Jones & Laughlin Steel v. Pfeifer*, 462 U.S. 523 (1983), involved a claim under § 5(b) of the Act against a vessel owner rather than (as in this case) a claim against an independent stevedoring company under state law. This Court stressed that its decision did not mean that a stevedore like respondent could pursue a claim directly against a stevedore employer like petitioner: "Of course, § 5(b) does make it clear that a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its

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[1] *See, e.g.*, *Stewart v. Dutra Constr. Co.*, 343 F.3d 10, 14 (1st Cir. 2003), *cert. granted*, 540 U.S. 1177 (2004); *Gravatt v. City of New York*, 226 F.3d 108, 111 (2d Cir. 2000), *cert. denied*, 532 U.S. 957 (2001); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 938-39 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *Artis v. Norfolk & Western Ry.*, 204 F.3d 141, 144 (4th Cir. 2000); *Stowers v. Consolidated Rail Corp.*, 985 F.2d 292, 293 (6th Cir.), *cert. denied*, 510 U.S. 813 (1993); *Johnson v. Continental Grain Co.*, 58 F.3d 1232, 1235 (8th Cir. 1995); *Sample v. Johnson*, 771 F.2d 1335, 1346-47 (9th Cir.1985), *cert. denied*, 475 U.S. 1019 (1986); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1527 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

'stevedore' capacity." *Id.* at 531 n.6.

Likewise, *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) (cited at Pet. 12), concerned a member of a vessel's crew, not a stevedoring employee. In fact, the Court indicated that the Act's exclusivity provision would "dictate sole recourse to the LHWCA" if the plaintiff were "found not to be 'a master or member of a crew of any vessel.'" *Id.* at 491 n.3. This case presents the situation that *Gizoni* indicated would be governed by the LHWCA's exclusivity provision.

Respondent also cites *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985) (cited at Pet. 12), but that case was a coverage dispute – whether a welder was engaged in "maritime employment" and thus within the protections of the LHWCA. That case did not question the proposition that the LHWCA's remedy is exclusive for a stevedore employee like respondent who is indisputably within the scope of the LHWCA. Indeed, the *Herb's Welding* Court noted "Congress' undoubted desire to treat equally all workers engaged in loading or unloading a ship," *id.* at 426 – a uniformity that would disappear under respondent's construction of the LHWCA, as different state courts would be free to reach conflicting coverage decisions and different states could engraft varying tort remedies upon the administrative scheme created by the Act.

In addition, the Fifth Circuit's decision conflicts with this Court's recent decisions involving the complete preemption doctrine and with lower court decisions faithfully following this Court. Respondent offers no answer to the extensive discussion in the Petition regarding *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003), and *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004). Respondent's sole strategy is to mischaracterize our position as supposedly claiming that "any federal statute with an exclusive remedy provision that might form the basis for a federal preemption defense in state court would become as source of complete preemption." BIO 14. We propose no such

sweeping, hard-and-fast rule. Rather, we have argued simply that both *Beneficial Nat'l Bank* and *Davila* instruct that a significant factor in the complete preemption doctrine is the federal interest in preserving the uniformity of a comprehensive statutory scheme. 539 U.S. at 10-11; 124 S. Ct. at 2495. The same federal interest lies at the heart of the LHWCA. In particular, the LHWCA evinces a plain intent to displace state courts and state judicial remedies, and this federal interest would be further frustrated by respondent's proposal that SAA Gulf's "defense . . . can be raised in state court." BIO 12.

4. Respondent spills much ink regarding 28 U.S.C. § 1447(d). Yet that statutory provision was not mentioned in either the Fifth Circuit's Order, Pet. App. 1a, or in respondent's opposition to the petition for writ of mandamus in the court of appeals. In any event, § 1447(d) would not bar review here, and any uncertainty regarding its meaning only provides a further reason to grant certiorari.

Respondent contends that "every court of appeals to have addressed the issue has concluded that a remand based on a lack of complete preemption is insulated from review under § 1447(d)." BIO 4. That is untrue. In *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124, 1133 (9th Cir. 1992), for example, the Ninth Circuit reversed a remand order after concluding that the plaintiff's claims were preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 *et seq.* The Ninth Circuit noted that "the district court's remand order embodied a jurisdictional decision under authority of section 1447(c)" and that the plaintiff therefore argued that "section 1447(d) bar against any type of review applies." *Id.* at 1129. But the court of appeals held that Section 1447(d) did not bar review: "Federal interests and concerns, however, sometimes rise to a level of importance that requires an exception. To invoke it, Congress must have expressed a desire to assert authority over an area to such degree that any claim in that area is deemed federal in character. . . . [Such claims] must be removed to federal courts

and not remanded to state courts." *Id.* at 1130.

Moreover, the BIO ignores the showing in the Petition (pp. 24-26) that the special nature of the LHWCA makes this case different from the other preemption cases cited by respondent. *See* BIO 4-7. In the LHWCA context, the issue is not simply the jurisdictional question of whether state-law tort claims should proceed in federal state or in state court, but whether the tort claims may proceed *at all* in *any* court in light of the statutory provisions mandating dismissal. When the right the defendant is asserting is not merely the right to a federal forum but also the right not to be sued *at all* in *any* forum (and the concomitant right to have the plaintiff remitted to his administrative remedies exclusively), that right cannot be vindicated by telling the defendant that he can raise his argument as a defense in state court. As this Court explained in *Franchise Tax Board v. Construction Laborers' Vacation Trust*, 463 U.S. 1, 24 n. 27 (1983), "the proper course for a federal district court to take after removal would be to dismiss the case altogether, without reaching the merits." *See also Clorox, Co. v. United States District Court for the Northern District of California*, 779 F.2d 517, 522 (9th Cir. 1985) (reversing district court remand order where federal law displaced state claims: "Once the district court discovers that the state court had no jurisdiction over a claim, rather than engage in a fruitless remand to a state court that lacks independent subject matter jurisdiction, it should dismiss the claim").

Because the LHWCA's administrative remedies bar tort suits in both state and federal courts, the cases cited in the BIO at pp. 4-7 are inapposite.[2] Indeed, the situation here resembles the

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[2] The cases cited by respondent have been the subject of criticism. *E.g.*, *Colorado ex rel. Salazar v. ACE Cash Express, Inc.*, 188 F. Supp. 2d 1282, 1286 (D. Colo. 2002) ("*Nutter* has subsequently been called into question and rejected by other circuits.") (citing *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 624 (8th Cir. 1997)).

immunity cases that the BIO attempts vainly to distinguish. BIO 8 n.2.

The situation here is also parallel to that in *Shives*, where the Fourth Circuit held that appellate review of a district court's remand order was available under *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976): "If we were to dismiss this appeal as unreviewable under 28 U.S.C. § 1447(d)" – the very disposition that respondent urges in this case – "then we would be leaving in place a remand order which would commit to the state courts the decision of whether the LHWCA provided coverage to the employee. To follow that course would thus deprive the federal courts of their proper role in resolving this important issue and would circumvent Congress' intent that LHWCA coverage issues be resolved in the first instance by the Department of Labor and ultimately in the federal courts of appeals." 151 F.3d at 167. "To avoid forfeiting the federal courts' role of reviewing LHWCA coverage issues is one of those extraordinary situations envisioned in *Thermtron* for exercise of the writ." *Id.* at 167-68.

By contrast, under respondent's view, federal appellate courts would lack the authority to protect comprehensive statutory schemes from state-court interference. *Shives* is thus irreconcilable with the decision below. Similarly, in *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1193 (8th Cir. 1988), the Eighth Circuit granted a writ of mandamus to correct a district court's remand order that was based on the erroneous conclusion that the plaintiffs' claim was not preempted by ERISA. "The district court ruled that as a matter of federal law ERISA does not preempt a [state-law] claim . . . and then remanded the claim to state court. Had the district court instead dismissed the complaint, this ruling would be directly appealable as a final order. The remand, however, is not directly appealable as a final order to this court. As a result of the remand, then, this court will never have appellate jurisdiction over this order in the

absence of review by mandamus." *Id.* at 1193.[3] The same reasoning applies here.

Respondent seeks to distinguish *Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 143 (1934) (appellate court had power to review issue which "preceded that of remand"), on the ground that the district court's ruling "is not the final word on the issue of preemption." BIO 8. But the district court's order is conclusive on the rights of the parties in the important sense that petitioner asserts the right to have a federal court, not a state court, pass on the question of the scope and applicability of the LHWCA – and, indeed, the right to have the case dismissed at once and the plaintiff remitted to his administrative remedies. That right cannot be vindicated if the case is remanded to state court. In that important sense, the district court remand order *is* the "final word." This Court's review is urgently required.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, this Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004).

Respectfully submitted.

RICHARD P. SALLOUM
FRANKE, RAINEY & SALLOUM
Post Office Drawer 460
Gulfport, MS 39502
(228) 868-7070

JONATHAN S. MASSEY
Counsel of Record
JONATHAN S. MASSEY, P.C.
7504 Oldchester Rd.
Bethesda, MD 20817
(301) 915-0990

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[3] Although *In re Life Ins.* did not involve Section 1447(c), *see* 857 F.2d at 1193 n.1, its reasoning is nonetheless instructive.

IRA J. ROSENZWEIG
ADAMS, HOEFER, HOLWADEL
& ELDRIDGE, LLC
Pan American Life Center
601 Poydras St., Suite 2490
New Orleans, LA 70130
(504) 581-2606